(H)
Supreme Court, U.S.
FILED
NOV 15 2002

No. 01-1605

In The
Supreme Court of the United States

IN RE: GARY A. TAYLOR AND WILLIAM S. HARRIS,

Petitioners.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

GARY A. TAYLOR
P.O. Box 90212
Austin, Texas 78709-0212
(512) 301-5100

WILLIAM S. HARRIS
307 W. Seventh Street,
Suite 1905
Fort Worth, Texas 76102
(817) 332-5575

Petitioners

CHARLES D. WEISSELBERG
Counsel of Record
ELISABETH SEMEL
DEATH PENALTY CLINIC
University of California
School of Law (Boalt Hall)
Berkeley, California
94720-7200
(510) 643-8159

RONALD W. BREAUX
SARAH TEACHOUT
HAYNES AND BOONE
901 Main St., Suite 3100
Dallas, Texas 75202-3789
(214) 651-5000

Attorneys for Petitioners
Gary A. Taylor and
William S. Harris

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

LIST OF SUPPLEMENTAL APPENDICES ii

TABLE OF AUTHORITIES iii

DISCUSSION 1

1. The circuits are split and the issue is exceedingly important 2

2. The plain language of § 848(q) is in harmony with the text and purpose of the entire statute, and raises no legitimate federalism concerns 6

CONCLUSION 10

LIST OF SUPPLEMENTAL APPENDICES

A. Order of the United States Court of Appeals for the Fifth Circuit, denying motion for appointment of counsel, *King v. Moore*, No. 02-13717-P, filed June 24, 2002 ..... 1a

B. Approval Letter, Counsel's Voucher and Excerpts from Counsel's Timesheets, *Coleman v. Mitchell*, No. 98-3545 (6th Cir.)..... 3a

C. Orders of the United States District Courts for the Eastern and Western Districts of Missouri and the Eastern District of Arkansas, approving funds for clemency representation..... 8a

TABLE OF AUTHORITIES

Page

CASES:

62 Cases of Jam v. United States, 340 U.S. 593 (1951) 6

Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) 10

Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176 (1982) 6

Clark v. Johnson (In re: Taylor), 278 F.3d 459 (5th Cir. 2002) 5

Coleman v. Mitchell, 268 F.3d 417 (6th Cir. 2001) 4

FTC v. Bunte Bros., 312 U.S. 349 (1941) 10

Furman v. Georgia, 408 U.S. 238 (1972) 7, 8

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 8

Gregory v. Ashcroft, 501 U.S. 452 (1991) 10

Herrera v. Collins, 506 U.S. 390 (1993) 7

Hill v. Lockhart, 992 F.2d 801 (8th Cir. 1993) 2, 3, 4

King v. Moore, No. 02-13717-P (11th Cir. July 24, 2002) 2

Lowery v. Anderson, 138 F. Supp. 2d 1123 (S.D. Ind. 2001) 3

Maine v. Thiboutout, 448 U.S. 1 (1980) 9

McFarland v. Scott, 512 U.S. 849 (1994) 1, 7, 8

Nelson v. Adams USA, Inc., 529 U.S. 460 (2000) 5

New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) 5

TABLE OF AUTHORITIES – Continued

Page

Raygor v. Regents of the Univ. of Minn., 534 U.S. 533 (2002) 10

Strickler v. Greene, 57 F. Supp. 2d 313 (E.D. Va. 1999) 3

United States v. Bass, 404 U.S. 336 (1971) 10

CONSTITUTIONAL PROVISIONS:

U.S. CONST., art. II, §2, cl. 1 8

U.S. CONST., amend. VIII 1

STATUTES:

21 U.S.C. §848(q) ..... *passim*

21 U.S.C. §848(q)(4)(B) 9

21 U.S.C. §848(q)(8) ..... *passim*

Former 21 U.S.C. §848(q)(10) 3

28 U.S.C. §2254 ..... 3, 7, 8

28 U.S.C. §2255 ..... 7, 8

42 U.S.C. §1988 9

42 U.S.C. §§2996, *et seq.* 9

OTHER AUTHORITIES:

Brief of the States of California, et al. as *Amici Curiae*, *McFarland v. Scott*, No. 93-6497 ..... 2, 8

Executions in the U.S. 2002, available at: http://www.deathpenaltyinfo.org/dpicexec02.html 4

Upcoming Executions, available at: http://www.deathpenaltyinfo.org/executionalert.html 4

SUPPLEMENTAL BRIEF

This supplemental brief is filed in response to the invited Brief for the United States as *Amicus Curiae*, and also presents additional materials (previously provided to the Solicitor General) that underscore the split among the circuits.

DISCUSSION

We must remember what is at stake here. Clemency is the failsafe in our criminal justice system; in certain circumstances, it alone can prevent a miscarriage of justice. The Eighth Amendment forbids the execution of those who are not sufficiently competent to understand that they are about to be executed. Nowhere in its brief does the United States dispute the central importance of clemency or competency procedures or the need for lawyers for individuals who face the sanction of death.

This is a straightforward case. By seeking to implement 21 U.S.C. § 848(q), the petitioners do no more than ask the Court to enforce the plain meaning of the statute as understood by twenty-five death penalty states. In *McFarland v. Scott*, 512 U.S. 849 (1994), these states told this Court:

> "[W]here Congress intended the 1988 amendments to affect state proceedings, it clearly knew how to accomplish this result. One provision provides that counsel appointed under the 1988 amendments 'shall also represent the defendant in . . . proceedings for executive or other clemency as may be available to the defendant.' 21 U.S.C. § 848(q)(8). Clemency proceedings usually follow the conclusion of post-conviction proceedings and typically occur on the eve of a scheduled execution. Congress likely concluded that appointed counsel – who by the time of any clemency proceedings would be intimately familiar with the facts and legal questions of a case –

> should be under a duty to assist with this stage of the capital case."

Brief of California, et al. as *Amici Curiae*, *McFarland v. Scott*, No. 93-6497 (filed Feb. 14, 1994), at 25. The language of the statute is clear and it should be the uniform law of the land.

1. The circuits are split and the issue is exceedingly important.

In the cases below, the Fifth Circuit ruled that there is no right to appointed counsel under § 848(q) in state clemency or competency proceedings. *See* Petition for Writ of Certiorari ("Pet.") 5, 8, 15; Pet. App. 8a, 10a. As the United States concedes, the Eleventh Circuit is aligned with the Fifth. *See* Brief for The United States as *Amicus Curiae* (filed Nov. 6, 2002) ("Gov.Br.") 11-13; Order, *King v. Moore*, No. 02-13717-P (11th Cir. July 24, 2002) (reprinted *infra* at 1a-2a). By contrast, the Eighth Circuit has held that the plain language of § 848(q) "insure[s] that indigent state petitioners receive 'reasonably necessary' competency and clemency services from appointed, compensated counsel." *Hill v. Lockhart*, 992 F.2d 801, 803 (8th Cir. 1993). Contrary to the government's assertion (*see* Gov.Br. 15-16), *Hill* directly conflicts with the Fifth and Eleventh Circuits.

First, *Hill* speaks in mandatory language: if the lawyer has filed a non-frivolous federal habeas corpus petition, and counsel seeks appointment in clemency or competency proceedings and shows that state funding is unavailable, appointment and compensation are required. *See Hill*, 992 F.2d at 803. That is precisely how *Hill* has been interpreted by the district courts within the Eighth Circuit. As the orders reprinted in the Supplemental Appendix (*infra*, 8a-25a) make clear, appointment and compensation under § 848(q) for state clemency representation have now become routine in federal courts in Missouri and Arkansas, by far the most active death penalty states within the Eighth Circuit. And federal

district courts in other states read and apply *Hill* this way too. *See Lowery v. Anderson*, 138 F. Supp. 2d 1123, 1125-26 (S.D. Ind. 2001); *Strickler v. Greene*, 57 F. Supp. 2d 313, 316-17 (E.D. Va. 1999).

Second, as the petition points out, the *Hill* court ruled that these procedural requirements should be met before state competency or clemency representation can be considered "reasonably necessary" under former 21 U.S.C. § 848(q)(10). The statute has since been amended to remove the requirement that the district court make a specific determination that the attorney's time was "reasonably necessary." *See* Pet. 13-14 n.3; *Hill*, 992 F.2d at 803. The government speculates that in light of the amendment, the Eighth Circuit might decline to authorize clemency and competency representation. *See* Gov.Br. 16. But this argument turns this amendment on its head. By removing a *barrier* to compensation for an attorney's time, Congress only made the mandatory duty to provide clemency and competency counsel even clearer. Congress left intact the requirement that counsel appointed for the 28 U.S.C. § 2254 petition "*shall* also represent the defendant" in clemency and competency proceedings. § 848(q)(8) (emphasis added). Inasmuch as appointed habeas counsel "shall" provide clemency and competency representation for an indigent state capital defendant, a judicial determination that such representation is "reasonably necessary" would be redundant for the defendant who has no other ability to obtain counsel.[1]

Third, the government proposes that had counsel for Mr. Clark and Mr. Soria sought compensation in the Eighth Circuit, their request would have been denied

[1] As explained *infra* at page 9, even though the statute has been amended, it would be proper for a district court to ask appointed counsel to demonstrate that no state funds are available and that counsel has filed a non-frivolous habeas corpus petition before seeking reimbursement for clemency and competency representation.

because "there is no evidence" that they followed the *Hill* procedures. *See* Gov.Br. 16. This argument is a diversion, as the Fifth Circuit unequivocally ruled that the statute does not provide for clemency or competency representation at all. Even so, there is no doubt that the petitioners provided clemency and competency representation after litigating non-frivolous habeas corpus petitions, and there is no whisper of a suggestion that Texas actually provides money for this work. The government is left with the sole objection that counsel failed to seek prior court approval for representation that the statute itself requires.

The holdings of the Fifth and Eleventh Circuits directly conflict with that of the Eighth Circuit. And it now appears that the Sixth Circuit follows the Eighth. The Sixth Circuit recently approved payment for one of Alton Coleman's appointed lawyers for federal habeas corpus and state clemency representation. The court's approval letter, counsel's voucher and excerpts from counsel's timesheets are reprinted *infra* at 3a-7a.[2]

The issue at hand is pressing, and the Court should not postpone addressing it. The petition in this case was filed on April 25, 2002. Between April 25 and November 11, the United States executed thirty-five men and women, twenty in Texas alone. Texas has twelve executions scheduled between November 19, 2002 and February 25, 2003.[3]

---

[2] Mr. Coleman had several cases, which were consolidated and severed at different points in time. *See Coleman v. Mitchell*, 268 F.3d 417, 425 n.2 (6th Cir. 2001). It is clear from the timesheets and the docket number that this is his state conviction from Ohio, and the clemency proceedings were before state authorities. Mr. Coleman was executed by the State of Ohio on April 26, 2002. *See Executions in the U.S. 2002*, available at: http://www.deathpenaltyinfo.org/dpicexec02.html (last visited November 10, 2002).

[3] *See Executions in the U.S. 2002, supra*; *Upcoming Executions*, available at: http://www.deathpenaltyinfo.org/executionalert.html (last visited November 10, 2002).

The circuits are split, the issue is of surpassing importance, and review should be granted to ensure that more indigent defendants are not put to death without lawyers to assure meaningful clemency and competency review.[4]

---

[4] In a footnote in its brief, the United States suggests that the question of the application of the statute to competency-to-be-executed proceedings may not be properly presented. *See* Gov.Br. 7 n.1. The government is wrong on both the facts and the law.

With respect to the facts, counsel in *Soria* clearly informed the district court that they were seeking compensation for competency representation, and counsel described their competency work in great detail. *See* Pet. App. 27a-31a. The court clearly rejected counsels' request for compensation for the competency work. *See* Pet. App. 13a-15a; Payment Voucher and Out of Court Hourly Worksheet submitted Sept. 14, 2000 by William Harris; Payment Voucher and CJA Form 30 Worksheet submitted Oct. 24, 2000 by Gary Taylor. On appeal, the court of appeals correctly described the district court's holding and the question before the circuit: "whether district court [sic] correctly concluded that § 848(q)(8) did not authorize compensation for attorneys in state clemency *and competency* proceedings." Pet. App. 10a (emphasis added). Though the Fifth Circuit found that *Clark v. Johnson* (*In re: Taylor*), 278 F.3d 459 (5th Cir. 2002) was controlling in resolving this issue, that court clearly recognized that the question of competency representation was before it, just as that question had been before the district court.

With respect to the law, even if the two lower courts had mischaracterized counsels' requests as relating only to clemency representation, that mischaracterization could not prevent this Court from reaching the issue. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) (an issue is preserved for review when the lower court is "fairly put on notice" of its substance); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 583 n.24 (1979) ("The failure of the Court of Appeals to address the statutory issue decided by the District Court does not, of course, prevent this Court from reaching the issue.")

2. The plain language of § 848(q) is in harmony with the text and purpose of the entire statute, and raises no legitimate federalism concerns.

Section 848(q)(8) uses mandatory and expansive language: a state capital defendant who files a federal habeas corpus petition is entitled to appointed counsel for that case and, unless replaced, the same lawyer *shall* continue to represent the defendant in *such* clemency and competency proceedings *as may be available*. Given that the only clemency proceedings available to a state defendant are those before a state authority, the choice of mandatory and expansive language by Congress plainly requires that appointed and compensated counsel continue to represent the client in these subsequent state proceedings. The government argues that after reviewing the entire statute, this Court should rewrite § 848(q)(8) to supply some missing terms. "Such competency proceedings" should read "such *federal* competency proceedings," and "proceedings for executive or other clemency" should be modified to read "*federal* proceedings for executive or other clemency *that may be created in the future*." But "Congress expresses its purpose by words. It is for [this Court] to ascertain – neither to add nor to subtract, neither to delete nor to distort." *Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 190 n.11 (1982) (quoting *62 Cases of Jam v. United States*, 340 U.S. 593 (1951)). But the overall statute affords no basis to rewrite the section. Further, the operation of the statute – properly understood – raises no substantial federalism concerns, which may well explain why the State of Texas has expressly disclaimed any interest in this case.

The plain language of § 848(q)(8) fits seamlessly with the overall purpose and scheme of § 848(q). Section 848(q) revised the federal death penalty, and at the same time expressly addressed the need for counsel for state and federal capital defendants. Section 848(q)(8) sets forth the right to counsel for people convicted in capital cases who

seek federal post-conviction relief, including state prisoners, as this Court affirmed in *McFarland*. *See id.*, 512 U.S. at 854. Additionally, this Court acknowledged that Congress sought to provide "quality legal representation" to indigent state petitioners due to the "seriousness of the possible penalty" and the "unique and complex nature" of capital defense. *Id.* at 855 (quoting 21 U.S.C. § 848(q)(7)).

The government argues that the "remaining provisions" of § 848(q) undercut the plain language of § 848(q)(8) because many of them refer to procedures available only to federal criminal defendants. *See* Gov.Br. 8-12. The statute revised the federal death penalty in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), and the government is correct that several statutory provisions apply only in federal prosecutions. Nevertheless, Congress expressly required counsel for both state and federal death-sentenced prisoners from the point they file their petitions for federal post-conviction relief, and in all proceedings thereafter. Section 848(q) treats federal and state capital defendants equally from the moment they seek § 2254 or § 2255 relief. In a change from prior law, both are now entitled to counsel in these post-conviction proceedings. And the same lawyer must, unless replaced, continue to represent the client in clemency and competency proceedings.

This statutory scheme makes sense. Congress was fully aware – as this Court is aware – that clemency and competency proceedings generally arise *after* state and federal habeas corpus efforts are concluded,[5] and that these are vital and unique proceedings. Additionally, clemency and competency review often depends upon the facts of the underlying litigation, leaving the current

---

[5] *See, e.g., Herrera v. Collins*, 506 U.S. 390, 411-12 (1993) ("Clemency . . . is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.").

counsel in the best position to represent the client. *See* Brief of California et al., *McFarland v. Scott*, at 25. Far from contravening the context of the statute, continuous legal representation for these unique and complex matters effectuates and is consistent with the overall purpose of the statute.

Because § 848(q)(8) is part of a comprehensive scheme, the government also goes astray when it insists that Congress would not have intended a "radical departure" without a "clearer indication of congressional intent." *See* Gov.Br. 12. What this argument fails to recognize is that all of § 848(q) was a break from past practice; the statute created the post-*Furman* federal death penalty and sought to shore up protections for all capital defendants, state *and* federal, in post-conviction and other proceedings. Viewing § 848(q)(8) in context, as the government reminds us to do, reveals an unmistakable congressional intent to modify past practice.[6]

Further, § 848(q) raises no substantial federalism concerns. Section 848(q)(8) provides counsel in such

---

[6] One other "plain meaning" point bears mentioning. While federal clemency is exclusively executive (*see* U.S. CONST., art. II, § 2, cl. 1), the states have other forms of clemency. *See* Pet. 11-12. The Court must presume that Congress was aware of the practice in the states when it enacted § 848(q). *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (presuming that Congress was aware of the contours of state workers' compensation schemes in enacting federal legislation). By providing for counsel in "executive *or other clemency* as may be available to the defendant," Congress must have intended to encompass state proceedings, the only clemency proceedings that can be "other" than executive. The government attempts to give meaning to "other clemency" by suggesting that Congress was leaving open the possibility that other forms of federal clemency "might become available." *See* Gov.Br. 14 n.2. It strains credulity to believe that Congress included the phrase to keep open the possibility of a constitutional amendment.

clemency and competency proceedings "as may be available." Thus, the statute merely affords funding for counsel in proceedings that already exist under the laws of each state. This is not an unusual concept. Congress established the Legal Services Corporation, which provides legal assistance for poor people in state and federal court. *See* 42 U.S.C. §§ 2996, *et seq.* Further, in 42 U.S.C. § 1988, Congress provided for attorneys' fees in civil rights cases, including litigation brought in state courts. *See Maine v. Thiboutout*, 448 U.S. 1, 10-11 (1980). Section 848(q) does not require the states to establish any new procedures or to take any action whatsoever.

Moreover, § 848(q) does not interfere with any efforts by the states to provide counsel on their own. While the government has identified several states that do provide compensation for state clemency and competency-to-be-executed representation (*see* Gov.Br. 18), Texas and many other active death penalty states do not. The statute addresses this gap but does not undermine any funding efforts in the states. Section 848(q)(4)(B) provides for counsel when a defendant is "financially unable to obtain adequate representation or . . . other reasonably necessary services." If a state affords adequate counsel for state clemency or competency proceedings, the defendant is not "unable to obtain" such services, and is thus not entitled to federally-funded counsel. The district courts can require appointed counsel to show that funds are unavailable from the state when counsel submit their requests for reimbursement under § 848(q).

Finally, though the government cites several cases calling for a clear expression of intent before altering the federal-state balance (*see* Gov.Br. 12-13), the government's cases relate to proposed interpretations of federal statutes

that would actually intrude on state functions to a kind and degree not present here.[7] There is no tension between § 848(q) and state procedures. The federalism claim is a phantom.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GARY A. TAYLOR
WILLIAM S. HARRIS

Petitioners

CHARLES D. WEISSELBERG
Counsel of Record
ELISABETH SEMEL
DEATH PENALTY CLINIC*

RONALD W. BREAUX
SARAH TEACHOUT
HAYNES AND BOONE

Attorneys for Petitioners
Gary A. Taylor and
William S. Harris

Berkeley, California
November 2002

---

[7] *See Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533 (2002) (tolling statute of limitations for state law claims against nonconsenting states); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (interfering with state law qualifications for state judges); *United States v. Bass*, 404 U.S. 336 (1971) (federal criminal liability for conduct traditionally made criminal by the states); *FTC v. Bunte Bros.*, 312 U.S. 349 (1941) (FTC jurisdiction over purely local business); *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940) (application of the Sherman Act to a purely local strike).

* Francis Martin and Sarah Ray, law students at the University of California School of Law (Boalt Hall), assisted in preparing this brief.

SUPPLEMENTAL APPENDIX A
[Order]

(Filed July 24, 2002)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-13717-P

AMOS LEE KING,

Petitioner-Appellant,

versus

MICHAEL W. MOORE, Secretary,
Florida Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Appellant's motion for appointment of counsel is DENIED. For background, see *In re Lindsey*, 875 F.2d 1502, 1506-07 (11th Cir. 1989) (concluding 21 U.S.C. § 848(q) does not require appointment of counsel for death-row inmates in state post-conviction proceedings); *Clark v. Johnson*, 278 F.3d 459, 462 (5th Cir. 2002) (attorney is not entitled to compensation under § 848(q) for representation of inmate during state clemency proceedings).

Appellant's petition for certificate of appealability under 28 U.S.C. § 2253(c)(1)(B) is DENIED as unrequired.

For background, see *Weeks v. Jones*, 100 F.3d 124, 127 n.6 (11th Cir. 1996) (CPC is not required to appeal denial of appointment of counsel under § 848(q)(4)(B)); *Fuller v. Johnson*, 114 F.3d 491, 501 n.4 (5th Cir. 1997) (COA not needed for appeal under § 848(q)(4)(B)).

/s/ J.L. Edmondson
CHIEF JUDGE

SUPPLEMENTAL APPENDIX B
[Approval Letter, Counsel's Voucher and Excerpts from Counsel's Timesheets]

UNITED STATES COURT OF APPEALS
for the Sixth Circuit
100 East Fifth Street, Room 532
Potter Stewart U.S. Courthouse
Cincinnati, Ohio 45202-3988
[letterhead omitted]

Filed: June 7, 2002

David Stebbins
330 South High St.
Columbia, Ohio 43215

RE: 8-3945
Voucher No.

Dear Counsel:

The court has approved your CJA Form 20 for compensation of attorney time in the amount of $20,212.50 and expenses in the amount of $430.20 for a total of $20,642.70. The form has been forwarded to the Administrative Office of the United States Courts for payment. A copy is enclosed for your information.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

Leonard Green, Clerk

/s/

(Mrs.) Ehrlich
CJA Deputy Clerk
Direct Dial: 513-564-7078

Enclosure

[Handwritten notation omitted]

Criminal Justice Act Voucher submitted by David Stebbins
to the United States Court of Appeals for the Sixth Circuit
for representation of Alton Coleman,
including state clemency proceedings

1. CIR./DIST./DIV. CODE	2. PERSON REPRESENTED	VOUCHER NUMBER
06C	Coleman, Alto	

3. MAG. DKT./DEF. NUMBER	4. DIST. DKT./DEF. NUMBER	5. APPEALS DKT./DEF. NUMBER	6. OTHER DKT. NUMBER
		X:98-003545-001	

7. IN CASE/MATTER OF (Case Name)	8. TYPE PERSON REPRESENTED	9. REPRESENTATION TYPE
U.S. v. Coleman	Other:	Capital Habeas Corpus

10. OFFENSE(S) CHARGED (Cite U.S. Code, Title & Section) If more than one offense, list (up to five) major offenses charged, according to severity of offense.

11. ATTORNEY'S NAME (First Name, M.I., Last Name, including any suffix) AND MAILING ADDRESS

Stebbins, David
330 South High Street
Columbus OH 43215

Telephone Number: (614) 224-7291

13. NAME AND MAILING ADDRESS OF LAW FIRM (only provide per instructions)

12. COURT ORDER

- ☒ O Appointing Counsel
- ☐ F Subs For Federal Defender
- ☐ P Subs For Panel Attorney
- ☐ C Co-Counsel
- ☐ R Subs For Retained Attorney
- ☐ Y Standby Counsel

Prior Attorney's Name: _____

Appointment Date: _____

(A) Because the above-named person represented has testified under oath or has otherwise satisfied this court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney whose name appears in Item 11, who has been determined to possess the specific qualifications required by law, is appointed to represent this person in this case.

(B) The attorney named in Item 11 is appointed to serve as: ☐LEAD COUNSEL ☐CO-COUNSEL

Name of Co-Counsel or Lead Counsel: _____

Appointment Date: _____

(C) If you represented the defendant or petitioner in any prior proceeding related to this matter, attach to your initial claim a listing of those proceedings and describe your role in each (e.g., lead counsel or co-counsel).

☐ (D) Due to the expected length of this case, and the anticipated hardship on counsel in undertaking representation full-time for such a period without compensation, interim payments of compensation and expenses are approved pursuant to the attached order.

Signature of Presiding Judicial Officer or By Order of the Court

Date of Order: 12/15/2000

Nunc Pro Tunc Date: _____

(E) Repayment or partial repayment ordered from the person represented for this service at time of appointment. ☐YES ☐NO

CLAIM FOR SERVICES AND EXPENSES

14. STAGE OF PROCEEDING
Check the box which corresponds to the stage of the proceeding during which the work claimed at Item 15 was performed even if the work is intended to be used in connection with a later stage of the proceeding. CHECK NO MORE THAN ONE BOX. **Submit a separate voucher for each stage of the proceeding.**

CAPITAL PROSECUTION
- a. ☐ Pre-Trial
- b. ☐ Trial
- c. ☐ Sentencing
- d. ☐ Other Post Trial
- e. ☐ Appeal
- f. ☐ Petition for the U.S. Supreme Court Writ of Certiorari

HABEAS CORPUS
- g. ☐ Habeas Petition
- h. ☐ Evidentiary Hearing
- i. ☐ Dispositive Motions
- j. ☐ Appeal
- k. ☑ Petition for the U.S. Supreme Court Writ of Certiorari

OTHER PROCEEDING
- l. ☑ Stay of Execution
- m. ☐ Appeal of Denial of Stay
- n. ☐ Petition for Writ of Certiorari to the U.S. Supreme Court Regarding Denial of Stay
- o. ☑ Other

HOURS AND COMPENSATION CLAIMED — FOR COURT USE ONLY

15. CATEGORIES (Attach itemization of services with dates)	HOURS CLAIMED	TOTAL AMOUNT CLAIMED	MATH/TECH ADJUSTED HOURS	MATH/TECH ADJUSTED AMOUNT	ADDITIONAL REVIEW
a. In-Court Hearings (Rate per Hour = $ 125.00)	2.0			IN COURT TOTAL (Category a)	IN COURT TOTAL (Category a)
b. Interviews and Conferences with Client	17.7				
c. Witness Interviews	0.0			125.00	
d. Consultation with Investigators and Experts	35.0				
e. Obtaining and Reviewing the Court Record	0.0				
f. Obtaining and Reviewing Documents and Evidence	0.0			OUT OF COURT TOTAL (Categories b - j)	OUT OF COURT TOTAL (Categories b - j)
g. Consulting with Expert Counsel	0.0				
h. Legal Research and Writing	161.1		82.30		
i. Travel	24.8				
j. Other (Specify on additional sheets)	0.0				
Totals: Categories b thru j (Rate per hour = $ 125.00)	240.6	$30,075.00	161.80	20,047.50	
16. Travel Expenses (lodging, parking, meals, mileage, etc.)		$430.20		430.20	
17. Other Expenses (other than expert, transcripts, etc.)		$30,505.20		20,642.70	

18. CERTIFICATION OF ATTORNEY/PAYEE FOR THE PERIOD OF SERVICE	19. APPOINTMENT TERMINATION DATE IF OTHER THAN CASE COMPLETION	20. CASE DISPOSITION
FROM 1-5-00 TO 4/26/02		

21. CLAIM STATUS ☑ Final Payment ☐ Interim Payment Number ____ ☐ Supplemental Payment
Have you previously applied to the court for compensation and/or reimbursement for this case? ☑YES ☐ NO If yes, were you paid? ☒ YES ☐ NO
Other than from the court, have you, or to your knowledge has anyone else, received payment (compensation or anything of value) from any other source in connection with this representation? ☐ YES ☑ NO If yes, give details on additional sheets.
I swear or affirm the truth or correctness of the above statements.

Signature of Attorney: _____ Date: 5/10/02

APPROVED FOR PAYMENT — COURT USE ONLY

22. IN COURT COMP.	23. OUT OF COURT COMP.	24. TRAVEL EXPENSES	25. OTHER EXPENSES	26. TOTAL AMT. APPROVED
				$20,642.20

27. SIGNATURE OF THE PRESIDING JUDICIAL OFFICER	DATE	27a. JUDGE CODE
M.C. Dougherty	06.03.02	

BEST AVAILABLE COPY

ITEMIZATION OF TIME FOR APPOINTMENT
UNDER THE CRIMINAL JUSTICE ACT

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
UNITED STATES v. COLEMAN [sic]
[COLEMAN v. MITCHELL]
CASE NO: 98-3545
[Entries not expressly related to clemency are omitted]

* * *

DATE	DESCRIPTION	HOURS	CATEGORY
4/16/02	Attend Clemency Hearing	2.0	A
	* * *		
3/25/02	Telephone Conf./ Meetings Re: Clemency	5.5	D
	* * *		
11/7/0[1]	Review Records – Re Clemency	2.1	H
11/8/01	Research/Investigate Clemency	1.2	H
	* * *		
4/9/2002	Research & Draft Batson & Clemency Petition	4.5	H
4/10/2002	Research, Draft & Edit Batson, 60 (B) & Clemency Petition	5.5	H
4/11/2002	Research, Draft & Edit Batson, 60 (B) & Clemency Petition	6.0	H

4/12/2002	Research & Draft Clemency, Batson & 60 (B)	7.0	H
	* * *		
4/14/2002	Review Batson, Clemency (Meet w/ Co-Counsel)	4.0	H
4/15/2002	Prepare for Clemency Hear[i]ng; Prepare/ Draft Batson Petition	8.5	H
4/16/2002	Prepare for Clemency Hearing	8.5	H
4/17/2002	Research – Batson, Clemency, 60 (B), TV Suit	4.0	H
4/18/2002	Research – Batson, Clemency, 60 (B), TV Suit	4.0	H
	* * *		
4/23/2002	60 (B)/Coleman v. Wilkinson/Clemency, etc.	5.0	H

SUPPLEMENTAL APPENDIX C
[District Court Orders]

(Filed May 11, 2000)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

STANLEY D. LINGAR, Petitioner,	)	
vs.	)	Case No. 89-1954-C-7
MICHAEL BOWERSOX, Respondent.	)	

ORDER

This matter is before the Court upon the motion of petitioner's appointed counsel requesting authorization for payment of attorney's fees and expenses for their representation of petitioner in Missouri executive clemency proceedings.[1] Such authorization is within the scope of 21 U.S.C. § 848(q)'s provision for appointed counsel in federal capital cases and the Criminal Justice Act, 18 U.S.C. § 30006A(c). The request in this case appears to satisfy the three requirements set out by the Eighth Circuit Court of Appeals in *Hill v. Lockhart*, 992 F.2d 801, 803 (8th Cir. 1993), namely that this is a non-frivolous federal habeas corpus proceeding, (2) Missouri law provides no avenue to

[1] The Eighth Circuit appointed Kent Gipson to represent petitioner on October 17, 1997. On December 19, 1999, the Eighth Circuit appointed Jeremy Weis as substitute co-counsel. These appointments shall remain in effect with this Court during the clemency proceedings.

obtain compensation for these services, and (3) the request is made prior to performance of the services.

Accordingly,

IT IS HEREBY ORDERED that the motion of Kent E. Gipson and Jeremy S. Weis to authorize attorney fees and expenses for representation in petitioner's application for executive clemency [Doc. 42] is GRANTED.

IT IS FURTHER ORDERED that Kent E. Gipson and Jeremy S. Weis are authorized to be compensated for their representation of petitioner in an application for executive clemency at a rate of $125.00 per hour.

Dated this 11th day of May, 2000.

/s/ Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

(Filed October 12, 2000)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

JEFFREY LANE TOKAR, Plaintiff,	)	THIS IS A CAPITAL CASE
vs.	)	No. 4:96CV2255 CDP
MICHAEL BOWERSOX, Defendant	)	

ORDER

On motion of petitioner, Jeffrey Lane Tokar, the Court find [sic] that it is reasonably necessary to provide compensation for legal services to be provided by Michael J. Gorla and Elizabeth Unger Carlyle in applying for executive clemency; that the request is made as part of a non-frivolous federal habeas corpus proceeding; and that state law provides no avenue to obtain compensation for such services.

IT IS THEREFORE ORDERED THAT Michael J. Gorla and Elizabeth Unger Carlyle may represent Jeffrey Lane Tokar in his application for executive clemency and that they shall be compensated at such rates and in such manner as previously ordered during their representation of his habeas corpus claim.

Date: 10/12/00 /s/ Catherine D. Perry
UNITED STATES DISTRICT JUDGE

(Filed August 30, 2000)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ANTONIO RICHARDSON,	)	
Petitioner,	)	
vs.	)	Case No. 4:96-CV-2354-JCH
AL LUEBBERS,	)	
Respondent.	)	

ORDER

This matter is before the Court upon the motion of petitioner's appointed counsel requesting authorization for payment of attorney's fees and expenses for their representation of petitioner in Missouri executive clemency proceedings.[1] Such authorization is within the scope of 21 U.S.C. § 848(q)'s provision for appointed counsel in federal capital cases and the criminal Justice Act, 18 U.S.C. § 30006A(c). The request in this case appears to satisfy the three requirements set out by the Eighth Circuit Court of Appeals in *Hill v. Lockhart* 992 F.2d 801, 803 (8th Cir. 1993), namely that (1) this is a non-frivolous federal habeas corpus proceeding, (2) Missouri law provides no avenue to obtain compensation for these

[1] This Court appointed Gino F. Battisti to represent petitioner on December 12, 1996. On May 15, 1997, this Court appointed Lawrence S. Denk as substitute co-counsel. Counsel continued their representation through appeal and the filing of a petition for writ of certiorari. The Court's previous appointments shall remain in effect with this Court during the clemency proceedings.

services, and (3) the request is made prior to performance of services.

Accordingly,

IT IS HEREBY ORDERED that the motion of Gino F. Battisti and Lawrence S. Denk to authorize attorney fees and expenses for representation in petitioner's application for executive clemency is GRANTED.

IT IS FURTHER ORDERED that Gino F. Battisti and Lawrence S. Denk are authorized to be compensated for their representation of petitioner in an application for executive clemency at a rate of $125.00 per hour.

Dated this 30th day of August, 2000.

/s/ Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

(Filed May 2, 2001)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Joseph Amrine,	)	
Petitioner,	)	
vs.	)	No. 90-0940-CV-W-2
Michael Bowersox,	)	
Respondent.	)	

ORDER

Petitioner's motion to authorize attorney fees and expenses for representation in ancillary proceedings (Doc. #182), filed April 10, 2001, is sustained. After review of the estimated budget (Doc. #184), filed April 27, 2001, the Court orders that the budget for attorneys fees and expenses in the executive clemency proceeding not exceed $10,000 (ten thousand dollars).

/s/
Fernando J. Gaitan, Jr.
United States District Judge

Dated: May 02, 2001
Kansas City, Missouri

(Filed December 2, 1998)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RALPH L. DAVIS,	)	
Petitioner,	)	
vs.	)	CASE NO. 92-0061-CV-W-9
MICHAEL BOWERSOX,	)	
Respondent.	)	

The court grants the application filed by petitioner's counsel to be appointed pursuant to the Criminal Justice Act to represent petitioner in connection with his clemency proceedings before the Governor of Missouri.

The court imposes as a limit on the amount the government must pay for attorney fees and expenses the following that are reasonable limits on the amount of time and expense counsel should expend:

Attorney Fees	$6,000
Investigation	500
Services of Expert Witnesses	1,000
Miscellaneous Expenses	500
Total	$8,000

The court believes most of the investigation and legal research required for clemency proceedings has already been performed in connection with these habeas proceedings.

Should the attorney or attorneys representing petitioner require additional expenditure of funds or

additional time representing petitioner, they may make application to the undersigned judge for a modification of this order.

IT IS SO ORDERED.

Dated this 2nd day of December, 1998.

/s/
CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

(Filed February 11, 1999)

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JAMES E. RODDEN,	)	
Petitioner,	)	
v.	)	No. 91-0384-CV-W-9
PAUL DELO,	)	
Respondent.	)	

ORDER APPROVING LIMITED AMOUNT FOR PAYMENT OF FEDERAL FUNDS TO PURSUE CLEMENCY

Petitioner requests compensation for counsel to seek executive clemency from the Governor of Missouri. Respondent's counsel advises that no opposition will be filed to the request for payment submitted by petitioner's counsel.

Were it not for *Hill v. Lockhart*, 992 F.2d 801 (8th Cir. 1993), and the Policy of the Judicial Conference, I would have difficulty in concluding that an appeal to the Governor of Missouri for executive clemency is ancillary to a proceeding seeking federal habeas corpus relief.

Furthermore, if the execution date set by the Missouri Supreme Court was not two weeks away, I would require that a budget be presented and approved before authorizing payment of any federal funds to finance an appeal to the Governor of Missouri for executive clemency. However, because of the shortness in time, I will approve up to $5,000 for reasonable attorneys' fees incurred by Kent Gipson and/or Bruce Houdek without a pre-approved budget. The $5,000 includes reimbursement for reasonable

expenses. Nothing more will be approved without a budget that has been approved before the services are rendered or the expenses incurred.

IT IS SO ORDERED.

/s/
D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri

February 11, 1999.

(Filed May 21, 1999)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JAMES CHAMBERS,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 95-0369-CV-W-6
	)	
MICHAEL BOWERSOX,	)	
	)	
Respondent.	)	

ORDER

Petitioner requests compensation for counsel to seek executive clemency from the Governor of Missouri. If not for *Hill v. Lockhart*, 992 F.2d 801 (8th Cir. 1993), and the unusual statutory provisions there applicable, the court would have no doubt that the request should be denied. *Lockhart*, however, suggests that an appeal for executive clemency is treated as somehow ancillary to a proceeding seeking federal habeas corpus relief. The other conditions specified in *Lockhart* – non-frivolous habeas proceeding and no state law providing for such compensation – are satisfied.

The petitioner has requested Supreme Court review, however, and execution of the sentence will not be immediately imposed. If more than $5,000 will be sought, however, the court will require that a budget be presented and approved before authorizing payment of federal funds in excess of that amount. Counsel is directed to file any such proposed budget, with support, within 30 days of the date of this order.

SO ORDERED.

/s/
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

Dated: May 21, 1999.

(Filed February 21, 1997)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

KIRT WAINWRIGHT — PETITIONER

V. — No. Pb-C-92-211

LARRY NORRIS, Director
Arkansas Department of
Corrections — RESPONDENT

ORDER AUTHORIZING PAYMENT OF COUNSEL

Kirt Wainwright was executed by the state of Arkansas on January 8, 1997. At the direction of the Court, Mr. Al Schay served as one of Mr. Wainwright's attorneys throughout the state executive clemency proceedings and federal *habeas corpus* proceedings that preceded Mr. Wainwright's death. The Court finds that Mr. Schay is entitled to compensation for those services. *See* 21 U.S.C. § 848(q). As the Court has noted, compensation for services rendered in *habeas corpus* proceedings is unproblematic. The United States Court of Appeals of the Eighth Circuit has indicated, however, that "before services performed in a state competency or clemency proceeding can be considered reasonably necessary under § 848(q)(10), the district court must be satisfied, first, that the request is made as part of a non-frivolous federal habeas corpus proceeding, and second, that state law provides no avenue to obtain compensation for these services." *Hill v. Lockhart*, 992 F.2d 801, 803 (8th Cir. 1993). Mr. Schay has submitted his affidavit to the Court, and the Court is satisfied that the requirements of *Hill* have been met. The Court has also reviewed Mr. Schay's hourly worksheets and his form detailing the expenses associated with his representation

of Mr. Wainwright. Based on the foregoing, the Court directs that Mr. Schay be compensated $7,588.54 for his services in representing Mr. Wainwright.

IT IS SO ORDERED this 21st day of February, 1997.

/s/ Garrett Thomas Eisele
UNITED STATES DISTRICT JUDGE

(Filed March 6, 1997)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

KIRT WAINWRIGHT — PETITIONERS

v. — No. PB-C-92-211

LARRY NORRIS, Director
Arkansas Department of
Corrections — RESPONDENT

ORDER AUTHORIZING PAYMENT OF COUNSEL

Kirt Wainwright was executed by the state of Arkansas on January 8, 1997. At the direction of the Court, Mr. Craig Lambert served as one of Mr. Wainwright's attorneys throughout the state executive clemency proceedings and federal *habeas corpus* proceeding that preceded Mr. Wainwrights death. The Court finds that Mr. Lambert is entitled to compensation for those services. *See* 21 U.S.C. § 848(q). As the Court has noted, compensation for services rendered in *habeas corpus* proceedings is unproblematic. The United States Court of Appeals of the Eighth Circuit has indicated, however, that "before services performed in a state competency or clemency proceeding can be considered reasonably necessary under § 848(q)(10), the district court must be satisfied, first, that the request is made as part of a non-frivolous federal habeas corpus proceeding, and second, that state law provides no avenue to obtain compensation for these serves." *Hill v. Lockhart*, 992 F.2d 801, 803 (8th Cir. 1993). Mr. Lambert has submitted his affidavit to the Court, and the Court is satisfied that the requirements of *Hill* have been met. The Court has also reviewed Mr. Lambert's hourly worksheets and his form detailing the expenses associated with his representation

of Mr. Lambert [sic]. Based on the foregoing, the court directs that Mr. Lambert be compensated $14,344.01 for his services in representing Mr. Wainwright.

IT IS SO ORDERED this 6th day of March, 1997.

/s/ Garrett Thomas Eisele
UNITED STATES DISTRICT JUDGE

(Filed December 3, 1997)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

EUGENE WALLACE PERRY — PETITIONER

v. — No. PB-C-83-275

LARRY NORRIS, Director, Arkansas Department of Correction — RESPONDENT

ORDER

Eugene Wallace Perry was executed by the state of Arkansas on August 6, 1997. At the direction of the Court, Mr. Craig Lambert served as one of Mr. Perry's attorney [sic] throughout the state executive clemency proceedings and the federal *habeas corpus* proceedings that preceded Mr. Perry's death. The Court finds that Mr. Lambert is entitled to compensation for those serves [sic] pursuant to 21 U.S.C. § 848(q). As the Court has noted, compensation for services rendered in *habeas corpus* proceedings is unproblematic, and the Court finds that Mr. Lambert has shown satisfaction of the requirements set forth by the Eighth Circuit Court of Appeals in *Hill v. Lockhart*, 992 F.2d 801, 803 (8th Cir. 1993), allowing compensation for legal assistance during state clemency proceedings. The Court has also reviewed Mr. Lambert's hourly worksheets and his form detailing the expenses associated with his representation of Mr. Perry. Based on the foregoing, the court directs that Mr. Lambert be compensated $26,306.81 for his services in representing Mr. Perry.

IT IS SO ORDERED this 2nd day of December, 1997.

/s/ Garrett Thomas Eisele
UNITED STATES DISTRICT JUDGE